Supreme Court, U.S.
FILED
JUL 1 2005
OFFICE OF THE CLERK

No. 05-41

In the
Supreme Court of the United States

SEAN PASEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CARLOS MORALES
Counsel of Record

THE MORALES LAW FIRM, PLLC
13101 PRESTON
SUITE 300
DALLAS, TX 75240
(972) 233-0095

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED FOR REVIEW

This case raises a significant issue left open by the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005). The issue concerns the application of the plain-error doctrine to appeals from sentences rendered under the Federal Sentencing Guidelines before the Supreme Court ruled that they are advisory rather than mandatory. Because there is a three-way split among the circuit courts regarding the application of the plain-error doctrine, this nation's highest Court is asked to answer this important question.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 7

I. The Booker decision and the plain-error doctrine 7

A. United States v. Booker, 125 S.Ct. 738 (2005) 7

B. Plain Error 8

II. The Third, Fourth, and Sixth Circuits' approach 10

A. The Third, Fourth, and Sixth Circuits' require re-sentencing in all Booker error cases 10

B. Other Circuits criticize the Third, Fourth, and Sixth Circuits' approach 11

III. The First, Fifth, Eighth, Tenth, and Eleventh Circuits' approach 12

A. The First, Fifth, Eighth, Tenth, and Eleventh circuits struggle with substantial rights and require the defendant to prove that the result would have been different under advisory Guidelines 12

B. Criticism of the Eleventh Circuit's Approach 13

IV. The Second, Seventh, Ninth, and D.C. Circuits' approach 15

A. The Second, Seventh, Ninth, and D.C. circuits offer a well-reasoned solution to the substantial rights element of the plain-error test 15

B. Criticism of the Second Circuit's Approach 16

V. The Court should apply the limited remand approach adopted by the Second, Seventh, Ninth, and D.C. Circuits to Sean Pasek's case 18

A. The Circuits need guidance from this Court on the application of the plain-error test in Booker error cases on direct appeal 18

B. The Fifth Circuit's approach precludes a review of whether substantial rights were affected and, therefore, should not be adopted by this Court 19

C. The Court should adopt the limited remand approach 20

VI. Conclusion 21

APPENDIX

Appendix A - 4/4/05 Fifth Circuit Per Curiam Opinion 1a

Appendix B - 4/12/04 District Court Transcript Sentencing Hearing 4a

Appendix C - 1/23/04 Presentence Report 13a

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) 8

Blakely v. Washington, 124 S.Ct. 2531 (2004) . 8, 20, 21

Johnson v. United States, 520 U.S. 461 (1997) 8

Kotteakos v. United States, 328 U.S. 750 (1946) . . 10, 11

United States v. Booker, 125 S.Ct. 738 (2005) . . . *passim*

United States v. Dominguez Benitez,
124 S. Ct. 2333 (2004) 12

United States v. Olano, 507 U.S. 725 (1993) . . 8, 15, 21

United States v. Ameline,
400 F.3d 646 (9th Cir. 2005) . . . . . *passim*

United States v. Antonakopoulos,
399 F.3d 68 (1st Cir. 2005) 8, 20

United States v. Coles,
403 F.3d 764 (D.C. Cir. 2005) 9, 16

United States v. Crosby,
397 F.3d 103 (2d Cir. 2005) . . . . . *passim*

United States v. Davis,
397 F.3d 173 (3d Cir. 2005) 10

United States v. Hughes,
401 F.3d 540 (4th Cir. 2005) 9, 10, 11, 13

United States v. Mares,
402 F.3d 511 (5th Cir. 2005) 7, 9, 13, 19, 21

United States v. Oliver,
397 F.3d 369 (6th Cir. 2005) 9, 10

United States v. Paladino,
401 F.3d 471 (7th Cir. 2005) 9, 15, 16, 20

United States v. Pennell,
409 F.3d 240 (5th Cir. 2005) 13, 19

United States v. Pirani,
406 F.3d 543 (8th Cir. 2005) 13

United States v. Rodriguez,
398 F.3d 1291 (11th Cir. 2005) 11, 12, 13, 16

CONSTITUTION

U.S. Const. Amend. VI . . . . . *passim*

STATUTES AND RULES

18 U.S.C. § 3742(f) 1-5, 7, 15

Fed. R. Crim. P. 52(b) 5, 8, 12

OPINION BELOW

The opinion of the court of appeals in United States v. Pasek (04-10377) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals in United States v. Pasek was entered on April 4, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. U.S. Const. Amend. VI.

STATUTES

Sec. 3742. Review of a sentence

(a) Appeal by a Defendant. - A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) (FOOTNOTE 1) than the maximum established in the guideline range; or

(FOOTNOTE 1) See References in Text note below.

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government. - The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence -

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) (FOOTNOTE 1) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea Agreements. - In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure -

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on Review. - If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals -

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration. - Upon review of the record, the court of appeals shall determine whether the sentence -

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for -

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the

particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable. The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and Disposition. - If the court of appeals determines that the sentence -

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and -

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand

the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Application to a Sentence by a Magistrate Judge. - An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) Guideline Not Expressed as a Range. - For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

18 U.S.C. § 3742(f).

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52.